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Instructing the Jury on Comparative Fault Issues: A Current Guide to Understanding the Nature of Comparison in Comparative Fault

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NOTES

INSTRUCTING THE JURY ON COMPARATIVE FAULT ISSUES: A CURRENT GUIDE TO UNDERSTANDING THE NATURE OF COMPARISON IN COMPARATIVE FAULT

INTRODUCTION

Since *Butterfield v. Forrester*[1] in 1809, American common law has known contributory negligence to be a complete bar to recovery in a tort action. The onset of comparative negligence, however, has greatly changed this state of affairs. Where at one time virtually all jurisdictions recognized the defense of contributory negligence, now only six states continue to hold this defense as a complete bar to recovery.[2] Minnesota joined the move to comparative negligence in 1969 by adopting the Minnesota Comparative Negligence Statute, amended in 1978 as the Minnesota Comparative Fault Act.[3]

Though comparative negligence is now well established both nationally as well as in Minnesota, it has become so in a relatively short period of time. The fact remains that it is still a new phenomenon.

1. 11 East 60, 103 Eng. Rep. 926 (1809).

2. Alabama, Maryland, North Carolina, Virginia, and Washington D.C. continue to recognize contributory negligence as a total bar to any plaintiff's claim. *See* Allman v. Beam, 272 Ala. 110, 130 So. 2d 194 (1961); Gutterman v. Biggs, 249 Md. 421, 240 A.2d 260 (1968); Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968); Smith v. Virginia Elec. & Power Co., 204 Va. 128, 129 S.E.2d 655 (1963); Rogers v. Cox, 75 A.2d 776 (Mun. Ct. App. Dist. Col. 1950). North Carolina and Virginia recognize comparative negligence in application to employees of railroads in intrastate commerce. *See, e.g.*, N.C. GEN. STAT. § 62-242 (1986).

3. Minnesota changed its system by statutory amendment to comparative fault. *See infra* notes 7-8 and accompanying text. Essentially, the change meant a recognition of comparative negligence principles in strict liability actions. *See* MINN. STAT. § 604.02 (1986).

Comparative negligence principles continue to modify and adapt themselves to the surrounding demands made by modern tort law.[4] Recent developments in tort reform have hastened these changes[5] and continue to put pressure on the courts and legislature in Minnesota to clarify the increasingly muddy waters of comparative fault application.[6] Because of the complexities of comparative fault issues and the difficulty in clearly conveying to the jury the necessary law, the role of jury instructions and special verdicts has become of utmost importance in guaranteeing the successful litigation of a negligence claim.

Before one can understand why and how the instructions are important, it is essential to understand their relationship to broader comparative fault principles. In general, this Note will attempt to work through the nature of comparison in comparative fault cases and its effect on jury instructions. The Note begins with a general discussion of the history, development, and existing status of Minnesota's comparative fault law. The Note will then analyze the role of causation in comparative fault considerations. Finally, this Note will consider three issues in a plaintiff's ability to recover: intentional conduct and higher degrees of negligence; assumption of the risk; and the relationship of mitigation of damages to comparative fault law.

I. Existing Forms of Comparative Negligence

Minnesota adopted comparative negligence in 1969 using a modified 49 percent system.[7] In essence, this system permitted a plaintiff to recover only where her negligence was not equal to or greater than that of the defendant. This system was later amended in 1978 to allow recovery where the plaintiff's negligence was not greater than that of the defendant.[8] This is commonly known as a modified

4. One example of the change in tort law is the emergence of complex civil litigation. Claims involving joinder of parties or claims, consolidation, intervention, as well as issues involving class action have spurred this change. The number of parties involved as well as the interrelated claims have created new issues affecting the application of comparative negligence. *See* R. Marcus & E. Sherman, Complex Litigation 1-10 (1985). *See also* Manual for Complex Civil Litigation Second, §§ 10:20; :30; :31; :33 (2nd ed. 1987).

5. In 1987, 16 states had passed some sort of tort reform legislation. This brings the total number of states adopting tort reform legislation to 36 in the last two years. *See* American Tort Reform Association, Products Liability Report (Jul. 24, 1987).

6. Between the adoption of comparative fault in 1978 and the writing of this article, over 702 cases dealing with comparative fault in some manner have come before the Minnesota courts.

7. *See* Act of May 23, 1969, ch. 624, § 1, 1969 Minn. Laws 1069, 1069.

8. *See* Act of April 5, 1978, ch. 738, §§ 6-8, 1978 Minn. Laws 836, 839-40, *codified at*, Minn. Stat. § 604.01-.02 (1986).

50 percent system. Both modified systems, 49 percent and 50 percent, are commonly found in jurisdictions across the United States.[9] Minnesota's decision to change was based upon a growing concern that a 49 percent system was misleading to the jury.[10] The jury, skeptical of the plaintiff's or defendant's predominant fault, commonly divides fault between the defendant and plaintiff 50-50, completely unaware that the consequences of doing so could bar the plaintiff's claim entirely.[11]

Nationally, two types of corrective measures have been taken. Some courts have allowed an instruction to be given to the jury informing them of the specific results of their final allocation.[12] Other states have simply allowed recovery in a 50-50 allocation.[13] Minnesota has done both.[14]

In addition to the above change, the 1978 amendment also changed Minnesota from a comparative negligence jurisdiction to a comparative fault jurisdiction. Generally speaking, the two are inter-

9. 49 percent: Arkansas: ARK. STAT. ANN. § 16-64-122 (1987); Colorado: COLO. REV. STAT. § 13-21-111 (1987); Georgia: GA. CODE ANN. §§ 46-8-291, 51-11-7 (1982); Idaho: IDAHO CODE §§ 6-801 to 6-806 (1979); Kansas: KAN. STAT. ANN. §§ 60-258a, 60-258b (1983); Maine: ME. REV. STAT. ANN. tit. 14, § 156 (1987 Supp.); Utah: UTAH CODE ANN. § 78-27-38 (1987); West Virginia: Bradley v. Appalachian Power Co., 163 W. Va. 332, 256 S.E.2d 879 (1979).

50 percent: Connecticut: CONN. GEN. STAT. ANN. § 52-572h(b) (1988 Supp.); Hawaii: HAW. REV. STAT. § 663-31 (1985); Indiana: IND. CODE §§ 34-4-33-1 to 34-4-33-13 (1987 Supp.); Iowa: IOWA CODE §§ 668.1 - .10 (1987); Massachusetts: MASS. GEN. L. ch. 231, § 85 (1987 Supp.); Michigan: MICH. COMP. LAWS § 600.6304 (1987); Minnesota: MINN. STAT. §§ 604.01-.02 (1986); Montana: MONT. CODE ANN. §§ 27-1-702, 27-1-703 (1987); Nevada: NEV. REV. STAT. § 41.141 (1987); New Hampshire: N.H. REV. STAT. ANN. § 507:7-a (1983); New Jersey: N.J. REV. STAT. §§ 2A:15-5.1 - 5.3 (1987); North Dakota: N.D. CENT. CODE § 9-10-7 (1987); Ohio: OHIO REV. CODE ANN. § 2315.19 (Anderson 1987); Oklahoma: OKLA. STAT. tit. 23, §§ 12 - 14 (1986); Oregon: OR. REV. STAT. §§ 18.470 - .510 (1987); Pennsylvania: PA. STAT. ANN. tit. 42, § 7102 (Purdon 1982); Texas: TEX. CIV. PRAC. & REM. CODE ANN. § 33.001(a) (Vernon 1986); Vermont: VT. STAT. ANN. tit. 12, § 1036 (1987); Wisconsin: WIS. STAT. ANN. § 895.045 (1987 Supp.); Wyoming: WYO. STAT. § 1-1-109 (1987).

10. *See* H. WOODS, COMPARATIVE FAULT § .2 at 89 (2d ed. 1987) [hereinafter WOODS].

11. *Id.*

12. *See, e.g.*, Ebanks v. Southern Ry. Co., 640 F.2d 675 (5th Cir. 1981); Thomas v. Board of Township Trustees, 224 Kan. 539, 582 P.2d 271 (1978); Roman v. Mitchell, 82 N.J. 336, 413 A.2d 322 (1980); Schabe v. Hampton Bays Union Free School Dist., 103 A.D.2d 418, 480 N.Y.S.2d 328 (1984); Smith v. Gizzi, 564 P.2d 1009 (Okla. 1977); Peair v. Home Ass'n of Enola Legion No. 751, 287 Pa. Super. 400, 430 A.2d 665 (1981); Adkins v. Whitten, 297 S.E.2d 881 (W. Va. 1982).

13. *See, e.g.*, Michigan H.B. 5154, § 6304(7) (1986); WYO. STAT. § 1-1-109 (1987).

14. *See* MINN. STAT. § 604.01, subd. 1 (1986) (contributory fault must be greater than the fault of the person against whom recovery is sought in order to bar recovery); MINN. R. CIV. P. 49.01(2) (1987) (in actions involving the comparative fault statute, the court must inform the jury of the effect of its answers to the percentage of negligence questions and shall permit counsel to comment).

changeable[15] with the distinguishing factor being that comparative *fault* takes comparative negligence principles a step further by recognizing their application to actions involving strict liability.[16] Minnesota's comparative fault statute relies heavily upon language in the Uniform Comparative Fault Act.[17] In its definition of fault, the Minnesota statute uses verbatim the definition found in the Uniform Act which "includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability."[18] Additionally, both the Minnesota and the Uniform Act definitions expressly include "breach of warranty, unreasonable assumption of the risk not constituting express consent, misuse of a product, and unreasonable failure to avoid an injury or to mitigate damages."[19]

II. The Role of Causation In Comparative Fault

Because the complete bar of contributory negligence is abrogated by the use of comparative fault, the role of causation is elevated to even greater importance.[20] It is evident that causation must therefore be emphasized in tort litigation. The role of causation becomes the foundation upon which the allocation of fault is distributed by the jury. Plaintiffs' lawyers will attempt to show that, while their client may have also been negligent, this negligence was not the proximate cause of the harm that resulted. Defense lawyers, on the other hand, will attempt to show that it was the plaintiff's actions, not those of the defendant, that were in fact the cause of her injuries.[21] The principle behind comparative fault is that losses should be allocated among tortfeasors according to the degree of each party's relative culpability. The effect of emphasizing causation relegates relative culpability to a more equitable and fair determination of

15. *See* Strauss v. Waseca Village Bowl, 378 N.W.2d 131, 133 (Minn. Ct. App. 1985) ("The issue of comparative negligence is not a separate and distinct issue from that of comparative fault.").

16. *See, e.g.*, Ryan v. McDonough Power Equip., Inc. 734 F.2d 385, 389 (8th Cir. 1984) ("Minnesota's rule requires comparison between the fault of all persons liable for damages under either negligence or strict liability"). *See also* Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (liability is assessed in proportion to fault). This is an oversimplificaton of the process involved in the application of comparative negligence to strict liability. While many jurisdictions, including Minnesota, recognize this application, this Note will not focus on this aspect of Minnesota's comparative fault statute.

17. *See* Unif. Comparative Fault Act, 12 U.L.A. 37 (Supp. 1988).

18. Minn. Stat. § 604.01 subd. 1a (1986). *See also* Unif. Comparative Fault Act, 12 U.L.A. at 38-9.

19. *See* Minn. Stat. § 604.01, subd. 1a; Unif. Comparative Fault Act, 12 U.L.A. at 38-9.

20. *See* Woods, *supra* note 10, § 5.1, at 103

21. *Id.*

fault for purposes of comparison. Causation, therefore, is an important starting point in understanding when comparative fault can be applied.

Simple causation if often referred to as "cause in fact."[22] Where the issue is one regarding cause in fact, the determination is relatively simple:

> Of all the questions involved, it is easiest to dispose of that which has been regarded, traditionally, as the most difficult: has the conduct of the defendant caused the plaintiff's harm? This is a question of fact . . . It is a matter upon which any layman is quite competent to sit in judgment as the most experienced court. For that reason, in the ordinary case, it is peculiarly a question for the jury.[23]

While cause in fact may be simple, problems frequently arise in issues of *proximate* cause. A defense counsel, for example, when stripped of a cause in fact argument, will no doubt assert that, even if the defendant were negligent, his negligence was not the "proximate" cause of the plaintiff's injuries.[24] Minnesota courts leave issues of proximate cause and foreseeability to the jury.[25] Generally, the threshold of causation necessary to surpass summary judgment must be a link between the injury and the defendant's actions. This principle was recently stated in *Jonathan v. Kvaal*.[26] In *Jonathan*, the plaintiff was rendered a quadraplegic after diving into an above ground, vinyl-lined swimming pool. In denying the defendant's summary judgment motion, the court held that the "plaintiff need only demonstrate a plausable causal link between breach of duty and his injuries to allow a claim of negligence to be brought to a jury."[27]

The concept of causation and its relationship to comparative fault can also be demonstrated by another Minnesota case. In *Strauss v.*

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22. *Id.* at 104.

23. W. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 264 (5th ed. 1984) [hereinafter PROSSER].

24. *See* WOODS, *supra* note 10, at ch 5.

25. *See, e.g.*, Jonathan v. Kvaal, 403 N.W.2d 256, 262 (Minn. Ct. App. 1987); Hedlund v. Hedlund, 371 N.W.2d 232, 236 (Minn. Ct. App. 1985) (citing Roberts v. Donaldson, 276 Minn. 72, 149 N.W.2d 401 (1967)).

26. 403 N.W.2d 256 (Minn. Ct. App. 1987).

27. *Id.* at 257. In its decision, the court disregarded an earlier, factually similar case. Both the trial court and the dissenting judges on appeal cite McCormick v. Custom Pools, Inc., 376 N.W.2d 471 (Minn. Ct. App. 1985). *McCormick* held that if one is aware of the danger in the use of a product, there is no liability, regardless of any "causal link" between a duty owed to plaintiff and plaintiff's injuries. The majority refuted this holding by stating that the knowledge of danger of the product is only one factor in resolving the issues. *Kvaal*, 403 N.W.2d at 258. Also, in Balder v. Haley, 399 N.W.2d 77 (Minn. 1987) and Germann v. F.L. Smithe Machine Co., 395 N.W.2d 922 (Minn. 1986) the Minnesota Supreme Court stated that in failure to warn cases, questions of adequacy of warning and causation should be questions for the jury.

Waseca Bowl,[28] the jury found the defendant negligent, but determined that his negligence did not cause the plaintiff's injury.[29] Upon assessing the inconsistency of the jury's apportionment, the trial court entered judgment for the defendant. The judgment was affirmed on appeal, since it was an accurate outcome due to the lack of simple causation on the part of the defendant's negligence.[30]

This unique result demonstrates the confusion which may result in issues of causation as a part of comparative fault. The role of causation in comparative fault raises questions of apportionment. Is apportionment to be made by comparing fault, or by comparing the extent to which the fault being compared contributed to the injury? Further yet, should the apportionment be based on both?[31] Some authorities feel that once causation has been established, "the apportionment must be made on the basis of comparative fault rather than comparative contribution."[32] In an admiralty case, the United States Supreme Court, in *United States v. Reliable Transfer Co.*,[33] stated that liability "is to be allocated among the parties proportionately to their comparative fault," not according to their degree of causation.[34]

A contrasting view is taken by the Wisconsin courts. In *Kohler v. Dumke*,[35] the Wisconsin Supreme Court concluded "that the word 'negligence' in the comparative negligence statute . . . means *causal negligence* . . . Therefore, in comparing the negligence of two or more persons, the jury is to consider both the elements of negligence and causation."[36] The majority of jurisdictions seem to support this view.[37]

Minnesota case law points to agreement with this view. Though

28. 378 N.W.2d 131 (Minn. Ct. App. 1985).

29. The plaintiff was injured when she slipped and fell in the defendant's bowling alley. In response to special verdict forms the jury found that the defendant's negligence did not cause the plaintiff's injuries, but apportioned twenty-five percent of the fault to the defendant. The answers to the special verdict questions were inconsistent. On appeal, the court determined that, while the answers indicated that the jury did not understand the consequences of its comparative negligence verdict, they did indicte that the jury did not believe the defendant's negligence caused the injuries. *Strauss*, 378 N.W.2d at 133.

30. *Id.*

31. *See* WOODS, *supra* note 10, § 5.1, at 124.

32. *Id.*, *quoting* Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 481 (1953).

33. 421 U.S. 397, *on remand*, 522 F.2d 1381 (2d Cir. 1975).

34. *Id.* at 403. *See also* Gele v. Wilson, 616 F.2d 146, 147-48 (5th Cir. 1980) (quoting U.S. v. Reliable Transfer Co., 421 U.S. 397 (1975)); State v. Kaatz, 572 P.2d 775, 782 (Alaska 1977) (what is to be compared is negligence — conduct, fault, culpability — not causation, either physical or legal); Metropolitan Dade County v. Cox, 453 So. 2d 1171, 1173 (Fla. Dist. Ct. App. 1984) (all of plaintiff's fault must be compared with all of defendant's fault).

35. 13 Wis. 2d 211, 108 N.W.2d 581 (1961).

36. *Id.* at 215-16, 108 N.W.2d at 583-84 (emphasis added).

37. *See* WOODS, *supra* note 10, § 5.1, at 113.

the courts have not expressly indicated in one statement the need to recognize both, they have in practice done so. In *Strauss*, the court of appeals clearly focused on causation as the main determinative in eventual liability. While the jury did in fact apportion the negligence which caused the accident,[38] it did not understand the consequences of doing so.[39] Nevertheless, the court held that "there was sufficient evidence to support the jury's determination of *causal* negligence."[40] In an earlier case, *Bergemann v. Mutual Service Insurance Co.*,[41] the jury found the defendant negligent but, as in *Strauss*, that his negligence did not cause the plaintiff's injuries. The Minnesota Supreme Court then reversed the judgment for the defendant due to the fact that the verdict could not "be reconciled with the facts."[42]

According to the Minnesota Jury Instruction Guides,[43] (JIG) apportionment of negligence should only be done where the jury has affirmatively answered special verdict questions regarding negligence and causation.[44] Minnesota's comparative fault statute also includes reference to both causation and contributory negligence in stating "[l]egal requirements of causal relation apply both to fault as the basis for liability and to contributory fault."[45]

The main purpose for the specific inclusion of causation in the JIG and statute is twofold: to ensure consideration of causation in the overall apportionment of damages, and to ensure that doctrines such as last clear chance are absorbed by the comparison of fault.[46]

In Minnesota, causation is merely a factor to be considered along with the total negligence of both the plaintiff and defendant. Causation is not entitled to a separate independent jury instruction but should be focused on in closing arguments.[47] Therefore, the role of causation becomes a single element in the main determination of overall fault. Unfortunately, this is not consistently followed in Minnesota. When it is, however, the issue of causation will be simplified. Regardless of the consistency of its application, an effective lawyer must focus on the perspective of the jury in instructing on issues in-

38. *Strauss*, 378 N.W.2d at 133.

39. *Id.* at 134.

40. *Id.* at 133 (emphasis added).

41. 270 N.W.2d 107 (Minn. 1978).

42. *Id.* at 110.

43. MINN. JURY INSTRUCTION GUIDE — CIVIL 3d (1987).

44. No comparative negligence instruction is given in Minnesota as "under the comparative negligence statute M.S.A. § 604.01, a general verdict normally will not be used. The issues are to be given in the process of reading the special questions to the jury." MINN. JURY INSTRUCTION GUIDE — CIVIL 2d, comment to JIG No. 145 G-S.

45. MINN. STAT. § 604.01 subd. 1a (1986).

46. Conversation with Michael K. Steenson, James E. and Margaret A. Kelley Chair Professor of Law, William Mitchell College of Law (Jan. 26, 1988).

47. *Id.*

volving causation.[48]

In analyzing the issue of causation, the doctrine of last clear chance offers an example of the actual role and effect of determining apportionment of fault.[49] Though uniformly rejected by the majority of comparative negligence jurisdictions,[50] the doctrine of last clear chance is applicable only where the defendant's failure to avoid the consequences was the last negligent act. Hence, the defendant's failure to avoid the act becomes the proximate cause of the injury. Conversely, the doctrine is not applicable if the plaintiff's own conduct was the last negligent act before the harm occured.[51]

Georgia has retained the doctrine,[52] despite its longstanding recognition of comparative negligence. A case from the Georgia Court of Appeals offers a good factual example of the role of causation in comparative fault. In *Grayson v. Yarbrough*,[53] the plaintiff's three year old son was killed after being struck by the defendant's automobile. The child went into the street to pick up a toy football. He picked it up only to drop it again. At this point, the boy was hit by the defendant's car.[54]

The *Grayson* court held for the plaintiff on the theory that, because the plaintiff should have known of the peril of the boy, the actions of

48. *See* MINN. JURY INSTRUCTION GUIDES, CIVIL 3D JIG 140 at 113 (1986).

49. The majority of comparative negligence jurisdictions have abolished the doctrine of last clear chance. *See, e.g.*, Kaatz v. State, 540 P.2d 1037, 1050 (Alaska 1975) (the doctrine is "merely a means of ameliorating the harshness of the contributory negligence role" and is therefore unnecessary after the adoption of comparative fault); Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981) (abolishing last clear chance after adopting comparative negligence); de Anda v. Blake, 562 S.W.2d 497 (Tex. Civ. Ct. App. 1978) (the doctrine of last clear chance is deemed unnecessary after comparative negligence); Ratlief v. Yokum, 280 S.E.2d 584 (W. Va. 1981) (abolishing last clear chance doctrine after adopting comparative fault).

It has also been suggested, though Minnesota has not agreed, that the retention of last clear chance based on issues of proximate cause is inappropriate. *See* COMPARATIVE NEGLIGENCE § 4.10(2) (Matthew Bender 1987). *See also* Stewart v. Madison, 278 N.W.2d 284, 286 (Iowa 1979); Cushman v. Perkins, 245 A.2d 846, 850 (Me. 1968); *Ratlief*, 280 S.E.2d at 589; Danculovich v. Brown, 593 P.2d 187, 195 (Wyo. 1979).

50. *See supra* note 49. There have been no recent decisions by the Minnesota Supreme Court defining the effect of comparative fault on last clear chance. The Minnesota Civil jury instruction takes the position that last clear chance still survives. *See* MINN. JURY INSTRUCTION GUIDES CIVIL 3D JIG 140 at 115 (1986). Clearly, should Minnesota actually retain the doctrine, it would be at odds with virtually every other comparative negligence jurisdiction. *See* WOODS, *supra* note 10, Appendix at 647-48.

51. *See generally* PROSSER, *supra* note 23, at § 66.

52. *See, e.g.*, Shuman v. Mashburn, 137 Ga. App. 231, 223 S.E.2d 268 (1976); Conner v. Mangum, 132 Ga. App. 100, 207 S.E.2d 604 (1974); Petroleum Carrier Corp. v. Jones, 127 Ga. App. 676, 194 S.E.2d 670 (1972).

53. 103 Ga. App. 243, 119 S.E.2d 41 (1961).

54. *Id.* at 244, 119 S.E.2d at 42.

the boy did not proximately cause his death.[55] To establish the proper determinations of fault it is clear that the question of causation must first be answered. In this regard, the doctrine of last clear chance, adopted to counter the one-sided effect of contributory negligence, was based upon a theory of proximate cause.

Yet, as Prosser states,

> In all probability this defeats the purpose of [comparative fault] legislation, since the system of apportionment breaks down in one important group of cses, where a loss from the fault of two parties is still visited on one . . . The causation explanation appears to have been something which was itself invented as a justification; and any necessity for the last clear chance [doctrine] as a palliative of the hardships of contributory negligence obviously disappears when the loss can be apportioned.[56]

Therefore, separately instructing the jury on issues of proximate cause only defeats the purpose of comparative fault principles. Although the doctrine of last clear chance has been abolished in most jurisdictions, when the focus is properly on causation, a last clear chance *situation* may affect the jury's apportionment of damages. For example, where a driver of an automobile is aware that another person is in a position of peril, it could be argued that the driver who was the most immediate cause is also the most culpable. Hence, the immediacy of causation can affect the jury's apportionment of fault.

III. Issues of Comparative Fault

A. Intentional Conduct and Higher Degrees of Negligence

Minnesota courts, along with a majority of jurisdictions, hold that comparative fault principles do not apply to intentional torts.[57] This would of course be true for both plaintiff's conduct as well as the defendant's.

Generally, if a plaintiff is guilty of willful, wanton, reckless or gross negligence, it is clear that within Minnesota no comparison problems are presented. Because Minnesota's comparative fault statute bars recovery where plaintiff's negligence is greater than the defendant's, any of the above higher degrees of negligence will clearly bar a plaintiff's claim when fault is properly allocated by the jury.[58]

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55. *Id.* at 245, 119 S.E.2d at 43.

56. Prosser, *supra* note 23, § 6, at 438-439.

57. *See, e.g.*, Florenzano v. Olson, 387 N.W.2d 168, 176 (Minn. 1986) (comparative fault is not applicable to action in fraud); Kelzer v. Wachholz, 381 N.W.2d 852, 854 (Minn. Ct. App. 1986) (intentional tort actions are not subject to the comparative fault statute).

58. Generally, if a plaintiff's negligence is willful, wanton, or reckless compared to the defendant's ordinary negligence, it follows that such negligence by the plaintiff

On the other hand, when a defendant's conduct is willful, wanton, or reckless, Minnesota has traditionally held that contributory negligence is not a defense to such actions.[59] This has now been changed with the adoption of comparative fault. In *Kempa v. E.W. Coons Co.*,[60] the plaintiff, injured in a work related accident involving a fork lift truck, sued his employer and the manufacturer. The manufacturer was found to be "willfully indifferent" to the safety of others.[61] In applying comparative fault, the court stated:

> 'fault' includes "acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others. . . ." We have said that reckless conduct includes willful and wanton disregard for the safety of others, and we have also pointed out that reckless misconduct differs from intentional wrongdoing in one very important particular — the reckless act is intended by the actor, but the harm is not.[62]

While some jurisdictions hold contra,[63] the general trend is in this direction.[64]

Also to be considered are the issues surrounding an action which involves breach of a statute. In *Zerby v. Warren*,[65] the Minnesota Supreme Court established that the sale of glue to a minor in violation of a statute created absolute liability on the part of the retailer for the wrongful death of another minor as the result of the inten-

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would be higher in degree than that of the defendant and therefore a complete bar. As will be discussed, *see infra* text accompanying notes 63-64, where the defendant is equally willful, wanton or reckless, contributory negligence is not available as a defense.

59. *See* Farmers Ins. Exch. v. Hewitt, 274 Minn. 246, 257, 143 N.W.2d 230, 238 (1966).

60. 370 N.W.2d 414 (Minn. 1985).

61. *Id.* at 421.

62. *Id.* (citations omitted).

63. *See, e.g.*, Randall v. Harrold, 121 Mich. App. 212, 328 N.W.2d 622, 624 (1982) (contributory negligence is not a defense to willful, wanton misconduct); Wollaston v. Burlington Northern, Inc., 188 Mont. 192, —, 612 P.2d 1277, 1280 (1980) (contributory negligence of plaintiff is no bar to recovery for injuries caused by the reckless or wanton misconduct of the defendant); Davies v. Butler, 95 Nev. 763, 771, 602 P.2d 605, 610 (1979) (the Nevada statute uses gross negligence as conduct to be compared but "it is clear that the legislature . . . could not have contemplated that the term would include the distinct concepts of willful and wanton misconduct").

64. *See, e.g.*, Amoco Pipeline Co. v. Montgomery, 487 F. Supp. 1268, 1272 (W.D. Okla. 1980) (applies contributory negligence even though defendant's conduct was classified as gross negligence or willful and wanton misconduct); Sorenson v. Allred, 112 Cal. App. 3d 717, 169 Cal. Rptr. 441 (1980) (contributory negligence applies even though the conduct of the defendant is willful and wanton); Montag v. Board of Educ., 112 Ill. App. 3d 1039, 446 N.E.2d 299 (1983) (comparative negligence has not eliminated willful and wanton misconduct standard); Kabella v. Boushelle, 100 N.M. 461, 672 P.2d 290 (N.M. Ct. App. 1983) (intimating that willful and wanton misconduct would be compared to plaintiff's contributory negligence).

65. 297 Minn. 134, 210 N.W.2d 58 (1973).

tional sniffing of the glue.[66] The court went on to state that assumption of the risk and comparative negligence were not available as defenses.[67]

The way in which statutory breaches are treated did not change upon the enactment of comparative fault. In *Seim v. Garavalia*,[68] the Minnesota Supreme Court again stated that "because the principle of absolute liability is based upon legislative intent, the comparative fault statute did not necessarily abolish absolute liability. *Zerby v. Warren* is consistent with the comment in the Uniform Comparative Fault Act."[69]

Since gross negligence is generally considered a lesser degree of negligence than willful, wanton or reckless conduct, it can be presumed that Minnesota also applies comparative negligence to the gross negligence of either party. Very little case law exists on this issue in Minnesota. Some cases have indicated, however, acceptance of gross negligence in comparative fault situations.[70]

B. Assumption of the Risk

Minnesota's use of the Uniform Comparative Fault Act's definition of "fault" expressly includes "assumption of the risk not constituting an express consent."[71] Shortly after the adoption of comparative fault, the Minnesota Supreme Court clarified this definition in the case of *Springrose v. Wilmore*.[72] Here the court adopted a two-tiered definition involving primary and secondary assumption of the risk. Generally, this holding was interpreted to mean that Minnesota treats assumption of the risk as a type of fault to be compared.[73] Specifically, primary assumption of the risk focuses on "whether the defendant had any duty to protect the plaintiff from risk of harm. It is not, therefore, an affirmative defense."[74] Secondary assumption of the risk, on the other hand, is an "affirmative defense to be proved

66. *Id.* at 140, 210 N.W.2d at 62.

67. *Id.*

68. 306 N.W.2d 806 (Minn. 1981).

69. *Id.* at 812 (citations omitted). The court looked to the Uniform Comparative Fault Act, upon which much of Minnesota's statute is based, for guidance. The comment cited by the *Seim* court stated that "[a] tort action based on violation of the statute is within the coverage of the Act if the conduct comes within the definition of fault and unless the statute is construed as intended to provide for recovery of full damage irrespective of contributory fault." UNIF. COMPARATIVE FAULT ACT, § 1, comment, 12 U.L.A. at 39 (Supp. 1988).

70. *See, e.g.*, Bilotta v. Kelley Co., 346 N.W.2d 616 (Minn. 1984).

71. MINN. STAT. § 604.01 subd. 1a (1986).

72. 292 Minn. 23, 192 N.W.2d 826 (1971).

73. *See* MINN. STAT. § 604.01. *See also* L. SCHWARTZ, COMPARATIVE NEGLIGENCE, § 8.3 (2d ed. 1986).

74. Springrose v. Wilmore, 292 Minn. 23, 24, 192 N.W.2d 826, 827 (1971).

by a causally negligent defendant . . .."[75] The court then went on to merge the concept of secondary assumption of the risk with contributory negligence, thereby abolishing both under the Minnesota comparative fault statute.[76] In short, where comparative fault principles apply, only primary assumption of the risk remains a complete bar to any plaintiff's claim.

This view was later echoed in *Pitts v. Electro-Static Finishings, Inc.*,[77] when the court stated

> [the] term 'assumption of the risk' has two meanings in Minnesota. In its primary sense it means simply that the defendant owed no duty of care toward the plaintiff and therefore could not be guilty of negligence with respect to him. In its 'secondary sense' assumption of the risk means simply that the plaintiff was guilty of contributory negligence or fault . . .[78]

Consistent with this view, the Minnesota Supreme Court abolished the "obvious danger" rule. In *Holm v. Sponco Manufacturing, Inc.*,[79] the court found the doctrine in conflict with comparative fault principles. The court stated that

> [the] latent-patent defect rule makes obviousness a complete bar to recovery. It circumvents Minn. Stat. § 604.01 (1980) and swallows up the assumption of the risk defense. This result is contrary to public policy apportioning loss between blameworthy plaintiffs and defendants . . . Therefore, the latent-patent danger rule . . . is rejected and a 'reasonable care' balancing test [is] substituted . . . .[80]

Making a distinction between primary and secondary assumption of the risk involves an examination of finer issues. Though cases finding primary assumption of the risk are rare in occurence,[81] one such case is *Wagner v. Thomas J. Obert Enterprises*.[82] *Wagner* involved a plaintiff who was injured from a fall in a rollerskating rink. The jury found the plaintiff to be 100 % negligent due to her primary assumption of the risk. Recognizing that "[o]ne of the few instances where primary assumption of the risk applies is in cases involving patrons of inherently dangerous sporting events, . . . such as skating,"[83] the ultimate determination by the court focused on two choices: Whether the harm resulted from "an inherent risk of rollerskating," in which case the plaintiff had "voluntarily entered a relationship in which the plaintiff assumes well known, incidental risks;" or from a

75. *Id.*
76. *Id.*
77. 607 F.2d 799 (8th Cir. 1979).
78. *Id.* at 801.
79. 324 N.W.2d 207 (Minn. 1982).
80. *Id.* at 213.
81. *See, e.g.*, Henkel v. Holm, 411 N.W.2d 1 (Minn. Ct. App. 1987).
82. 396 N.W.2d 223 (Minn. 1986).
83. *Id.* at 226.

failure on behalf of the defendant to carry out a duty of strict supervision.[84] The court ultimately determined that the plaintiff, who injured herself while exiting the skating surface, had in fact primarily assumed the risk by knowingly encountering the inherent dangers of rollerskating. Therefore, no duty on behalf of the management existed.[85]

More specifically, while an examination of Minnesota case law reveals that primary assumption of the risk is still applicable despite the enactment of comparative fault,[86] the Minnesota Supreme Court, in *Griffiths v. Lovelette Transfer*,[87] stated that there should be no jury instruction on primary assumption of the risk, unless there is a disputed fact issue.[88]

While Minnesota courts have made the distinction between primary and secondary assumption of the risk, there is still a debate over whether secondary assumption of the risk is an appropriate subject for jury instruction. Has secondary assumption of the risk in fact been abolished and therefore no longer valid, as apparently indicated in *Springrose v. Willmore*?[89] If so, a jury instruction would seemingly be inappropriate. Or, has the defense merely been reduced to nothing more than a form of fault to be compared and instructed upon, just as any other form of comparative negligence? If this is the case then perhaps an instruction is merited. Unfortunately, the Minnesota Court of Appeals has held both ways.

For example, in *Swagger v. City of Crystal*,[90] a spectator at a softball game sponsored by the city sued the city when she was injured after being hit by a foul ball. The trial court gave the jury a secondary assumption of the risk instruction and a contributory negligence instruction.[91] After the jury returned a verdict finding the plaintiff forty-nine percent at fault, the trial court subsequently granted the defendant's motion for judgment not withstanding the verdict on the grounds that, among other factors, the trial court erred in submitting both a secondary assumption of the risk question and a contributory negligence question.[92] On appeal, the Minnesota Court of Appeals affirmed the trial court, not on the secondary assumption of the risk error, but on the grounds that the plaintiff had primarily, not secondarily assumed the risk.[93] While not directly commenting on the al-

84. *Id.*
85. *Id.*
86. *See Henkel*, 411 N.W.2d at 4.
87. 313 N.W.2d 602 (Minn. 1981).
88. *Id.* at 605.
89. 292 Minn. at 24, 192 N.W.2d at 827.
90. 379 N.W.2d 183 (Minn. Ct. App. 1985).
91. *Id.* at 184.
92. *Id.*
93. *Id.*

leged error in a secondary assumption of the risk instruction, the appellate court seemed to indicate that it was not the instruction itself that was error but that it was the wrong assumption of the risk instruction — it should have been a primary assumption of the risk, not a secondary assumption of the risk instruction.[94]

In a similar situation in *Wagner v. Thomas J. Obert Enterprises*,[95] the trial court submitted instructions and a special verdict form to the jury regarding both primary and secondary assumption of the risk. The result was a verdict for the defendant, finding the plaintiff 100% negligent.[96] On appeal, the appellants argued that only the secondary assumption of the risk instruction was proper.[97] The court of appeals agreed and reversed the trial court decision.[98]

In doing so, the appellate court stated that

> Parties are entitled to a specific instruction on their theory of the case if there is evidence to support the instruction and it is in accordance with applicable law. . . . Because respondent's defense involved an issue of secondary assumption of risk, an instruction on secondary assumption of risk was appropriate.[99]

Other recent cases have held to the contrary. In *Thompson v. Hill*,[100] the spouse of an automobile passenger who drowned when the vehicle he owned and was riding in fell through the ice brought a wrongful death action. The trial court denied defendant's request for an instruction on the doctrine of secondary assumption of the risk.[101] The jury subsequently found the defendant sixty percent negligent and the plaintiff forty percent negligent.[102]

The court of appeals affirmed the lower court's denial of the instruction. In doing so, it stated that

> An instruction on [secondary] assumption of risk would have focused the jury's attention on Thompson's comparative negligence and prejudiced plaintiff. The instruction would have also forced the jury to apportion fault to Thompson under both the general fault instruction and under the assumption of risk instruction. The jury would have been needlessly confused. Improper submission of secondary assumption of risk to the jury is reversible error.[103]

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94. *Id.* at 185.
95. 384 N.W.2d 477 (Minn. Ct. App. 1986), *rev'd*, 396 N.W.2d 223 (Minn. 1986).
96. *Id.* at 480.
97. *Id.* at 485.
98. *Id.*, *rev'd*, 396 N.W.2d 223 (Minn. 1986) (primary assumption of the risk properly submitted, though supreme court questioned whether secondary assumption of the risk was part of the case).
99. *Id.* at 481 (citations omitted).
100. 366 N.W.2d 628 (Minn. Ct. App. 1985).
101. *Id.* at 630.
102. *Id.* at 632.
103. *Id.*

Because neither the Minnesota Supreme Court nor the legislature have specifically finalized the correct posture in approaching an instruction to the jury on assumption of the risk, the trial lawyer is on her own in guessing which way the court may direct. It is clear that in this issue, as well as other issues to be discussed in this Note, a well reasoned guide is needed. The Minnesota comparative fault statute offers little help other than establishing that assumption of the risk remains viable despite the enactment of comparative fault.[104] The comments contained in the Uniform Comparative Fault Act,[105] the model for the Minnesota statute, are also of little help as they focus on the issues surrounding the existence of assumption of the risk rather than instruction to the jury.[106]

Other comparative fault jurisdictions have fallen on both sides of whether or not to use an instruction, with the majority seeming to favor the abolishment of such an instruction.[107] Of the states like Minnesota which treat assumption of the risk as a type of fault to be compared,[108] the case law is as equally divided. For example, in *W.M. Bashlin Co. v. Smith*,[109] an Arkansas court submitted separate interrogatories and instructions to the jury on both the plaintiff's fault and possible assumption of the risk.[110] The plaintiff was found to be without fault but to have assumed the risk.[111] The same court, two years later, in *Rogers v. Kelly*,[112] held it was error to give an assumption of the risk instruction. The court stated as a caveat, "we caution the bench and bar that AMI 612 [the model assumption of the risk instruction] should be used only in exceptional circumstances, if indeed it is ever proper now that assumption of risk is not a complete defense."[113]

The Supreme Court of Iowa, in *Rosenau v. City of Esterville*,[114] took a solid position in stating, "[w]e hold that in a common-law tort case in which defendant raises the issue of plaintiff's negligence, the elements of 'assumed risk' shall no longer be pled and instructed on as a separate defense."[115]

In considering the effect of a jury instruction on secondary as-

104. MINN. STAT. § 604.01 (1986).
105. UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. at 39 (Supp. 1988).
106. *Id.*
107. *See generally* WOODS, *supra* note 10.
108. These states are presently Arizona, Arkansas, Indiana, Iowa, New York, and Washington.
109. 277 Ark. 406, 643 S.W.2d 526 (1982).
110. *Id.* at 412-13, 643 S.W.2d at 527.
111. *Id.* at 415, 643 S.W.2d at 534.
112. 284 Ark. 50, 679 S.W.2d 184 (1984).
113. *Id.* at 52, 679 S.W.2d at 185. *See* WOODS, *supra* note 10, at § 6.5.
114. 199 N.W.2d 125 (Iowa 1972).
115. *Id.* at 133.

sumption of the risk upon the apportionment of fault, Minnesota should follow the Iowa holding. Two considerations are at the basis of this opinion. First, while Minnesota's comparative fault statute does keep the concept of assumption of the risk as a viable legal issue, the courts, specifically the definitive decision by the Supreme Court in *Springrose v. Willmore*,[116] have drawn a distinction between primary and secondary assumption of the risk. In essence, primary assumption of the risk is a question of duty while secondary assumption of the risk has effectively been merged with contributory negligence.[117] This clearly makes secondary assumption of the risk an issue involving the reasonableness of the plaintiff's conduct and nothing more than contributory negligence. Therefore, it will have to be compared just as any other form of contributory negligence.

This being the accepted view, it seems logical that any separate instruction on secondary assumption of the risk is duplicative of the negligence issue and therefore, prejudicial to the negligent plaintiff. In addition, the effect of such considerations upon the jury's obligation of allocation of fault would create a confusing, burdensome task. This view was used by the court in *Thompson v. Hill*,[118] when it stated an instruction on the assumption of the risk would have "forced the jury to apportion fault to [the plaintiff] under both the general fault instruction and under the assumption of risk instruction. The jury would have been needlessly confused."[119]

Consistent with the holding in *Springrose*, the focus should be on the unreasonableness of the plaintiff's conduct in the same way as contributory negligence. There is no reason to unduly emphasize one part of the plaintiff's conduct in instructing on secondary assumption of the risk. Such an instruction would result in prejudice to the plaintiff, just as instructing on specific acts of the defendant's negligence would be prejudicial to the defendant. There are a number of cases that state that the plaintiff is entitled to only a general instruction on his theory of the case.[120] Similarly, the defendant should be entitled to only a general instruction on his defense theory of contributory negligence when the only focus is whether the plaintiff acted reasonably. In essence, the final conclusion must be that *Springrose* should be followed.

By eliminating the chance to instruct the jury on assumption of the risk, the courts would prevent the already complex issues of comparative fault before the jury from becoming even more complicated. In

116. 292 Minn. 23, 192 N.W.2d 826 (1971).
117. *Id.*
118. 366 N.W.2d 628 (Minn. Ct. App. 1985).
119. *Id.* at 632.
120. *See, e.g.*, Fallin v. Maplewood-North St. Paul Dist. No. 622, 362 N.W.2d 318, 322 (Minn. 1985); Leonard v. Parrish, 420 N.W.2d 629, 633 (Minn. Ct. App. 1988).

this manner, the jury is allowed to focus on the single issue which is at the base of all comparative fault questions: to what extent, if any, did the plaintiff contribute to and/or cause her own injuries? No clear need for such an instruction is evident when considering an opposite view. As secondary assumption of the risk is nothing more than a form of comparative negligence, the courts must start treating it as such by eliminating any distinguishable instructions to the jury. In doing so, complex comparative fault issues will be simplified.

C. *Failure to Mitigate Damages*

A third unresolved and conflicting area of Minnesota law regarding issues of comparative fault is the plaintiff's failure to mitigate damages and its affect on apportionment. The basic intent of the Minnesota Comparative Fault statute is to include "unreasonable failure to avoid an injury or to mitigate damages"[121] in apportioning fault. The decision not to wear a seat belt or helmet is a conscious failure to avoid possible injury, yet the present inconsistencies in this area of the law do not allow a uniform comparison of such failure.[122] The current change in the treatment of failure to wear a seatbelt, as evidenced by the mandatory seat belt legislation,[123] is inherently paving the way for the possible future comparison of such failure in the apportionment of fault.

The Minnesota Comparative Fault Act includes "unreasonable failure to avoid an injury or to mitigate damages" in its definition of fault.[124] Hence, a party has a duty to act reasonably in avoiding the consequences of the tortfeasor's act.[125] The statute allows a comparison of two different types of conduct: failure to reasonably avoid an injury and failure to mitigate damages.[126] The failure to take reasonable steps to mitigate damages and or avoid injury is "fault" which may be apportioned under the Comparative Fault Act.[127]

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121. MINN. STAT. § 604.01, subd. 1a (1986).

122. Both the seatbelt statute, MINN. STAT. § 169.685 (1986) and the helmet statute, MINN. STAT. § 169.974(1986) create exceptions to the general rule by denying admissibility of failure to wear either in apportioning *fault*. A defense lawyer, when faced with a plaintiff who has failed to wear a seat belt clearly cannot request any instruction in failure to mitigate damages. An instruction on failure to wear a helmet can be given but only toward apportionment of damages, *not fault*. *See Id.* § 169.974. Any other consideration of failure to mitigate damages or avoid injury is apparently governed by MINN. STAT. § 604.01, subd. 1a, and is therefore admissible as a type of fault to be compared.

123. *Id.* § 169.686 subd. 1 (1986).

124. *See id.* § 604.01, subd. 1a.

125. *See* Graffunder v. City of Mahtomedi, 376 N.W.2d 282, 285 (Minn. Ct. App. 1985).

126. *See* MINN. STAT. § 604.01, subd. 1a.

127. *See Graffunder*, 376 N.W.2d at 285, *citing* Lesmeister v. Dilly, 330 N.W.2d 95, 103 (Minn. 1983).

The failure to reasonably avoid an injury, referred to as the doctrine of avoidable consequences, is "similar to the doctrine of contributory negligence" and effectively denies recovery for any damages which could have been avoided by reasonable conduct on the part of the plaintiff.[128]

Prior to the onset of comparative fault, the doctrine of avoidable consequences was treated as relevent only "after a legal wrong ha[d] occured, but while some damages may still be averted, and bar[red] recovery only for such damages."[129] In contrast, contributory negligence was "negligence of the plaintiff before any damage, or invasion of his rights, has occured, which bar[red] recovery."[130] The adoption of comparative fault has taken away this contrast. In Minnesota, post-comparative fault, the avoidable consequences doctrine simply holds that a "party has a duty to act reasonably in avoiding the consequences of the tortfeasor's act"[131] and "failure to take reasonable steps to mitigate damages is 'fault' which may be apportioned under the Comparative Fault Act."[132]

The failure to mitigate damages focuses on the plaintiff's failure to diminish her injuries. Generally, the two comparisons are distinguishable. The threshold question is, could the plaintiff have reasonably avoided the consequences? This is the doctrine of avoidable consequences. If a plaintiff could not reasonably have done so, then the question becomes, could the plaintiff have reasonably diminished those injuries by using available protective measures. This is the doctrine of mitigation of damages.

While the law in Minnesota allows the failure to mitigate damages to be compared in apportioning fault, its application is quite inconsistent. Minnesota has two statutes which create this inconsistency.[133] Minnesota Statute section 169.685[134] is Minnesota's seat belt statute. Subdivision 4 of the statute states:

> Proof of the use or failure to use seat belts or a child passenger restraint system as described in Subdivision 5 . . . *shall not be admissible* in evidence in any litigation involving personal injuries or property damage resulting from the use or operation of any motor vehicle.[135]

Minnesota, with regard to seat belt issues, has done what a number of jurisdictions have done by creating a statutory exception to the

128. PROSSER, *supra* note 23, § 65, at 458.
129. *Id.*
130. *Id.*
131. *Graffunder*, 376 N.W.2d at 285.
132. *Id.*
133. *See* MINN. STAT. § 169.685, subd. 4 (seatbelt law); *id.* § 169.974, subd. 6 (helmet statute).
134. *Id.* § 169.685.
135. *Id.* at subd. (4).

general rule of comparison of plaintiff's failure to mitigate damages. The justification for doing so is not clearly present in any legislative or case history. The underlying purpose is possibly a desire to stay away from forcing a motorist to wear a seat belt.[136] Yet with the recent enactment of Minnesota's mandatory seat belt law, and accompanying fine[137] the continuation of this policy seems even more inconsistent. This subdivision, in and of itself, is perhaps an acceptable inconsistency given its wide acceptance.[138]

Minnesota's motorcycle statute[139] has presented a third approach to admission of mitigation of damages evidence.

Subdivision six of the statute states in pertinent part:

> In an action to recover damages for negligence resulting in any head injury to an operator or passenger of a motorcycle, evidence of whether or not the injured person was wearing protective headgear . . . *shall be admissible* only with respect to the question of damages for head injuries. Damages for head injuries of any person who was not wearing protective headgear *shall be reduced* to the extent that those injuries could have been avoided by protective headgear . . .[140]

The inconsistencies are clear. If, in the initial comparative fault statute, failure to mitigate is clearly fault to be compared in determining the allocation of percentages,[141] why then is the failure to wear a seat belt completely inadmissible? Additionally, if the exception for failure to wear a seat belt is somehow merited, why is failure to wear a helmet not included within this exception? Clearly, consistency in the application of failure to mitigate issues is needed.[142]

If Minnesota continues to hold the position that failure to wear a seat belt is inadmissible toward reduction of damages, it would no doubt be consistent with many other jurisdictions.[143] However, the

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136. Conversation with Michael K. Steenson, *supra* note 46. *See also* Weber, *A Multi-Disciplinary Approach to Seat Belt Issues*, 29 CLEV. ST. L. REV. 217, 238 (1980).

137. Act of April 26, 1988, ch. 648, § 1, 1988 Minn. Laws 892, 893.

138. Given the fact that a majority of jurisdictions adopt a similar position toward the seat belt defense, assuming the rationale for doing so is valid, the existence of Minnesota's seat belt statute is justifiable because of this consistency.

139. MINN. STAT. § 169.974 (1986).

140. *Id.* at subd. 6 (emphasis added).

141. *See id.* § 604.01, subd. 1a.

142. If consistency is a meritorious goal in the application of failure to mitigate damages issues, then certain changes must occur. The legislature must first look to the reasons for adopting the stance prohibiting admissibility of failure to wear a seat belt. In doing so it must determine if the recent adoption of the mandatory seat belt law and accompanying fine, *see supra* note 137, contradicts any basis for their original position. If it does, then clearly the admission of failure to wear a seat belt should be allowed in determining the allocation of fault. The same reasoning may apply to the helmet statute.

143. Presently, the majority of jurisdictions hold that failure to wear a seat belt and/or helmet is inadmissible toward apportionment of fault. *See, e.g.*, Hutchins v.

foundation for such a rationale is slowly being eroded through the passage of the mandatory seat belt law and the newly enacted accompanying fine. The way is being paved for the eventual comparison of failure to wear a seat belt as plaintiff's fault in overall apportionment.[144] Such comparison would not only bring failure to wear a seat belt or helmet within the ambit of the comparative fault statute, but would also greatly reduce the present inconsistencies.

It remains a fact, however, that only those failure to mitigate and avoid injury issues outside the parameters of the seat belt or helmet exceptions are governed by the comparative fault statute and are, therefore, fault to be compared. In submitting these issues to the jury, some difficult problems remain. For example, *Christopherson v. Independent School District No. 284*,[145] involved complicated mitigation of damages issues. The plaintiff, a fifteen year old junior high school student, was injured while walking between two parked school buses, when the foot of the driver of one bus slipped off the clutch causing the bus to lurch forward.[146] The plaintiff, despite warnings by the doctor and without notifying him, began to participate in gymnastics before her injuries had completely healed.[147] During a demonstra-

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Schwartz, 724 P.2d 1194 (Ala. 1986); Churning v. Staples, 628 P.2d 180 (Colo. App. 1981); Dare v. Sobule, 674 P.2d 960 (Colo. 1984); Lipscomb v. Diamini, 226 A.2d 914 (Del. Super. 1974); Quick v. Crane, 111 Idaho 759, 727 P.2d 1187 (1986); Clarkson v. Wright, 108 Ill.2d 129, 483 N.E.2d 268 (1985).

The variety of formulas and exceptions are numerous. *See, e.g.*, Ottem v. United States, 594 F. Supp. 283, 288 (D. Minn. 1984); Nash v. Kamrath, 21 Ariz. App. 530, 521 P.2d 161 (1974); Melesko v. Riley, 32 Conn. Supp. 89, 339 A.2d 479, 480 (1975); Insurance Co. of North Amer. v. Pasakarnis, 451 So. 2d 447 (Fla. 1984); De Graff v. General Motors Corp., 135 Mich. App. 141, 352 N.W.2d 719 (1984); Kopishke v. First Cont. Corp., 187 Mont. 471, 610 P.2d 668, 683 (1980).

There are also jurisdictions which allow such failure to be considered in apportioning fault. *See, e.g.*, Smith v. Goodyear Tire & Rubber Co., 600 F. Supp. 1561, 1563-64 (D. Vt. 1985); Franklin v. Gibson, 138 Cal. App. 3d 340, 188 Cal. Rptr. 23, 25 (1982); Wemyss v. Coleman, 729 S.W.2d 174 (Ky. 1987); Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65, 70 (1968); Foley v. West Allis, 113 Wis.2d 362, 149 N.W.2d 626, 640 (1967).

144. This point has not gone unnoticed by other jurisdictions and commentators. In Bertsch v. Spears, 20 Ohio App.2d 137, 139, 252 N.E.2d 194, 196 (1969), the Ohio appellate court predicted into the future by stating, "[I]t may well be that in a future case the evidence introduced or proffered will indicate that the failure to use a seat belt was a contributing factor in the occurrence of the accident or in producing or aggravating the plaintiff's injuries and that the issue should be submitted to the jury."

Additional support has been given by commentators for the view that "competent seat belt evidence should be admissible and a proper jury instruction tendered, but only if adequately supported by evidence." Weber, *supra* note 136, at 250.

145. 354 N.W.2d 845 (Minn. Ct. App. 1984).

146. *Id.* at 846.

147. Specifically, after hospital treatment, the plaintiff was advised that, if properly taken care of, the injury would heal itself. The doctor, however, also instructed the

tion of an exercise, plaintiff suffered further severe injuries, resulting in fifteen to twenty percent loss of function in her injured leg.[148] The plaintiff then sued both the school and the bus company. In the trial court, the jury found the plaintiff fifty percent negligent, the bus company forty percent negligent, and the school ten percent negligent.[149] The Minnesota Court of Appeals reversed and remanded on the grounds that the trial court erred in forbidding counsel to comment upon the effect of the jury's answers to the percentage of negligence questions.[150] While the court's resolution of the case in this manner made a failure to mitigate ruling unnecessary,[151] the court did address the issue, stating:

> [W]hile an injured party's fault in not avoiding injury may prevent recovery for that injury, it should not act to prevent recovery for an earlier injury. While the law provides the claimant with a remedy whether he seeks to avoid injurious consequences or not, the amount of damages recoverable is limited to the extent that he acted reasonably to prevent his own loss.[152]

The issues raised in this type of failure to mitigate situation can create amorphous applications of the statute. While the statute provides in its definition of fault a list of inclusions,[153] it by no means offers a definition of its terms. This is no different for failure to mitigate damages.

While the difficulties of demonstrating what constitutes unreasonable failure to avoid injury or mitigate damages are present, "it is not that opponents of the defense have been particularly successful . . . [r]ather, more accurately, the cases indicate that they usually fail to introduce evidence which would tend to establish its elements."[154]

Wisconsin has developed a standard establishing the necessary rules in demonstrating a failure to mitigate in the context of the seat belt defense.[155] In doing so, Wisconsin has taken a large step to-

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plaintiff on two different occasions that bending the injured knee could cause a more serious muscle rupture. *Id.*

148. *Id.*

149. *Id.* at 847.

150. *Id.* at 848.

151. *Id.*

152. *Id.*

153. MINN. STAT. § 604.01, subd. 1(a) (1986).

154. Bowman, *Practical Defense Problems—The Trial Lawyer's View*, 53 MARQ. L. REV. 191, 198 (1970). Mr. Bowman also states that the items of proof necessary to demonstrate failure to avoid or mitigate injury "have been identified and can be established in many cases with reasonable scientific certainty if the necessary experts are consulted and the extensive proof often required is undertaken." *Id.* at 198.

155. In Foley v. West Allis, 113 Wis. 2d 475, 335 N.W.2d 824 (1983), the Wisconsin Supreme Court adopted the following rules: (1) Determine the causal negligence of each party as to the collision of the two cars; (2) apply comparative negligence

ward eliminating the difficulties in successfully applying failure to mitigate or avoid injury.

If the mitigation issue is to be included in the comparative fault determination, it should be the subject of a separate jury instruction that tells the jury that the plaintiff cannot recover for what he should have avoided. In short, the plaintiff should not be subject to a double deduction.

CONCLUSION

The recent developments in United States tort law, specifically, the emergence of comparative negligence, have had an incredible impact on the application of traditional tort principles. These developments have perhaps been the result of a realization that the true function of the law is to protect the present needs of the best interests of all society.[156]

To meet these needs the law must constantly adapt and change. When new issues have arisen, the courts have clarified what these needs are and have begun to adapt the law to match them. The task is by no means finished with respect to comparative fault, and in realistic terms, may never be finished.

It is clear that the acceptance of comparative fault in Minnesota has raised many new issues. It has been the intent of this Note not to criticize the efforts to deal with the issues mentioned, but instead to categorize the problem, make litigators aware of what approach to take when instructing the jury, and finally to offer a plausible direction to take in solving the issues at hand.

Timothy Bettenga

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principles to eliminate from liability a defendant whose damages are less than that of the plaintiff. *Id.* 490, 335 N.W.2d at 831.

156. *See* WOODS, *supra* note 10, at Introduction.